IN THE
Supreme Court
OF THE
United States

Supreme Court, U. S.
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OCTOBER TERM, 1949

No. 152

LUCKENBACH STEAMSHIP COMPANY, INC. (a corporation), as Owner of the Steamship "Edward Luckenbach",

Petitioner,

vs.

SOCIETA ANONIMA PARTECIPAZIONI INDUSTRIALI COMMERCIALI (a corporation), NAVIGAZIONE LIBERA TRIESTINA, S. A. (a corporation), SPETT. SOCIETA ANONIMA DI SICURATA FRA ASSICURATORI (a corporation) (Owners and Underwriters of the Motorship "Feltre");

HAWAII LIQUOR COMPANY, LIMITED, et al. (Cargo Claimants),

Respondents.

BRIEF FOR RESPONDENTS, HAWAII LIQUOR COMPANY AND 64 OTHERS, CARGO CLAIMANTS, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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Respondents.

BRIEF FOR RESPONDENTS, HAWAII LIQUOR COMPANY AND 64 OTHERS, CARGO CLAIMANTS, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

This litigation arises out of a collision between petitioner's steamer, the Edward Luckenbach, and the motorship Feltre, on February 17, 1937, in the Columbia River upstream from Longview, Washington (R. 291). The collision caused damages to both vessels and the loss of and damage to the cargo aboard the Feltre (R. 293). This brief, in opposition to the petition for writ of certiorari, is presented in behalf of Hawaii Liquor Company and 64 others,[1] who were the owners of the cargo aboard the Feltre and who had nothing to do with navigation of either vessel.

The petition filed herein by Luckenbach Steamship Company, Inc., presents no special nor important reasons for a review on writ of certiorari. On the contrary, it is apparent from the opinion of the Circuit Court of Appeals (R. 1416; 127 F. (2d) 86), and even from the petition filed herein, that the issues presented in this litigation were wholly questions of fact. The legal principles applicable to the facts found by the Courts below and which were applied to such facts are well defined and well established by statute and decisions.

Petitioner seeks by its petition herein merely to secure a *fourth* review of the evidence on which it was held mutually at fault for the collision. The evidence was first considered by an experienced Special Master to whom the case was referred for hearing and determination. The Special Master, after considering the evidence and the briefs of all parties, made a full report and findings of fact holding both vessels to blame for the collision (R. 204-246).

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[1]The identity of all the cargo claimants is set forth at pages 78-81 of the Record.

The evidence was again considered by the District Court on exceptions by the owners of both vessels to the report and findings of the Special Master (R. 251, 278). The District Court, after considering the exceptions on the entire record and briefs of counsel, approved the report of the Special Master and made findings that both vessels were guilty of faults which caused the collision (R. 289-297).

The evidence was reviewed a third time by the Circuit Court of Appeals for the Ninth Circuit on appeals taken by both vessels. The Circuit Court of Appeals concurred with the Special Master and the District Court in finding that both vessels committed faults which caused the collision (R. 1416-1427; 127 F. (2d) 86).

Under these circumstances, the well known rule of this Court as to the effect of concurrent findings of the Courts below applies. The rule was recently reiterated in *Just v. Chambers*, 312 U.S. 383, 385, 85 L. Ed. 903, 905, an admiralty case, as follows:

> "In support of the judgment of the Circuit Court of Appeals, respondent asks us to review the evidence with respect to the cause of the claimant's injuries and the breach of duty by the shipowner, contending that the evidence was insufficient to support the findings. Applying the well-established rule, we accept the concurrent findings of the Courts below upon these matters (Texas & N. O. R. Co. v. Brotherhood of R. & S. Clerks, 281 U. S. 548, 558, 74 L. Ed. 1034, 1039, 50 S. Ct. 427) and we confine our attention to the question of the survival of the causes of action."

The foregoing rule is the more insistent in the present case because the issues herein were originally heard and determined by a special Master, rendering applicable Su-

preme Court Admiralty Rule 43½ (following 28 U.S.C.A. Section 723) which provides:

> "In all references to commissioners or assessors, by consent or otherwise, whether the reference be of all issues of law and fact, or only particular issues either of law or fact or both, the report of the commissioners or assessors shall be treated as presumptively correct, but shall be subject to review by the court, and the court may adopt the same, or may modify or reject the same in whole or in part when the court in the exercise of its judgment is fully satisfied that error has been committed: Provided, That when a case or any issue is referred by consent and the intention is plainly expressed in the consent order that the submission is to the commissioners or assessors as arbitrators, the court may review the same only in accordance with the principles governing a review of an award and decision by an arbitrator."

Petitioner does not contend that there is no evidence to support the findings of fault on the part of its vessel. It is apparent from the petition and supporting brief of petitioner, as well as from the opinion of the Circuit Court of Appeals, that there is ample evidence, strong evidence, to support the concurrent findings of fault of petitioner's vessel made by the three lower tribunals. Petitioner's contention is that the evidence supporting the findings of fault on the part of its vessel, the Edward Luckenbach, is not as strong as the evidence of fault on the part of the motorship Feltre (Petition, p. 10). This contention, even if it were justified by the record, which it is not, is hardly a proper ground upon which to request this Court to sift, compare and evaluate all the evidence for the sole purpose of determining whether it would give the same weight to

the evidence as was given below by the three concurring tribunals. The separate consideration and review of the evidence by three Courts would seem sufficient to determine the proper weight to be given to the evidence. In actual fact, the evidence of fault on the part of petitioner's vessel is not only clear and convincing, but much of it came from its own records and from the testimony of its own navigators.

A. THE FACTS.

The general facts showing the navigation of the Edward Luckenbach and the Feltre and their consequent collision are sufficiently set forth in the opinion of the Circuit Court of Appeals (R. 1416-1427; 127 F. (2d) 86-90). It shows that these two vessels sighted each other when they were several miles apart. Visibility was good. No other vessels were in the vicinity to complicate their navigation with respect to each other. The river channel was exceptionally wide—over 2,000 feet wide in the vicinity of the collision. Nevertheless, both vessels continued toward each other—the Edward Luckenbach on the wrong side of the channel—at full speed until they collided approximately at mid-channel without either vessel having taken any proper or timely action to avoid a collision.

B. PLEADINGS.

Petitioner Luckenbach Steamship Company, as owner of the Luckenbach, filed a petition for exoneration from liability for the damages arising out of the collision, or in the

alternative, limitation of such liability to the value of the Luckenbach and freight pending at the end of the voyage (R. 19). In conjunction with the limitation proceeding, all persons claiming damages against Luckenbach Steamship Company were restrained from bringing suit except in the limitation proceeding. Claims against petitioner for damages to the Feltre were filed by her owners and operators in the limitation proceeding (R. 49, 127). Claims were likewise filed against petitioner in the limitation proceeding by 65 individuals and corporations who owned the cargo aboard the Feltre (R. 78). Petitioner filed a cross-libel in the limitation proceeding for damage to the Luckenbach against the owners and operators of the Feltre (R. 184). The rights and liabilities of all the parties suffering damages by reason of the collision were thus presented and determined in the limitation proceeding commenced by petitioner.

C. FINDINGS OF FACT AND DECREE.

Although petitioner has set forth at length in its petition (pp. 3-5) the findings of fault on the part of the Feltre, petitioner neglected to set forth the findings of fault on the part of its own vessel, the Edward Luckenbach. The District Court approved the report and findings of fact of the Special Master and made the following findings of fact with respect to petitioner (R. 293-294):

> "The steamship Edward Luckenbach and petitioner were guilty in the following respects of negligent navigation and faults which contributed to and caused the said collision and consequent damage:

1. She violated the narrow channel rule in that she navigated too far to her own left and crossed the Upper Cottonwood Island Range.

2. She failed seasonably to sound the danger signal and failed to stop and reverse under the attendant circumstances and conditions.

3. She proceeded at an immoderate rate of speed for the conditions prevailing.

4. She failed, in a channel of ample width to enable the vessels to pass safely without crowding, to navigate so as to allow a safe margin for passing the Feltre.

5. She failed to take any compass bearings of the approaching Feltre, a precaution which would have permitted her to observe a safer margin in passing the Feltre."

After setting forth the foregoing findings as well as the findings of fault on the part of the Feltre, the Circuit Court of Appeals stated (R. 1421):

> "We see no sufficient reason for disturbing these findings. While the evidence is in sharp conflict the weight of it appears to us to require an affirmance."

The decree of the District Court, which was affirmed by the Circuit Court of Appeals, awarded cargo claimants recovery of their damages from petitioner,[2] limited to the amount of the limitation fund, and provided that the

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[2]Cargo claimants may recover their damages only from the non-carrying vessel which may, however, recoup one-half of such damages from the other vessel.

Aktieselskabet Cuzco v. The Sucarseco, 294 U. S. 394, 400, 79 L. Ed. 942, 946;

The Chattahoochee, 173 U. S. 540, 550, 43 L. Ed. 801, 806.

damages be equally divided between the two vessels in accordance with the usual rule for the apportionment of damages arising from collisions due to mutual fault (R. 298).

D. THE ONLY QUESTION PRESENTED IS A REQUEST FOR A FOURTH REVIEW OF THE EVIDENCE.

Petitioner's statement of the questions presented is simply a contention that although the fault of the Feltre was established by uncontradicted evidence and was in itself sufficient to account for the collision, the fault of petitioner's vessel was based upon evidence which was neither clear nor convincing (Petition, pp. 9-11). This contention, which is not supported by the record or by the opinions of the Courts below, is merely an argument as to the weight of the evidence. It is not even a claim that the evidence is insufficient to support the findings of fact on the part of petitioner's vessel.

The separate consideration of the evidence and the resulting concurrent findings of fault against petitioner by the three tribunals below should, under the well-established rule of this Court, constitute a conclusive determination of the facts involved in this litigation. Evidence which has convinced three separate tribunals may, we submit, be safely accepted as clear and convincing.

Petitioner states that the basis for its contention appears on the face of the opinion of the Circuit Court of Appeals. However, petitioner fails to support this statement in either its petition or lengthy brief.

The first premise set forth is that the faults of the Feltre were in themselves sufficient to account for the collision (Petition, p. 10). Petitioner does not set out any finding to that effect and we can find no such finding in the opinion of the Circuit Court of Appeals or in the findings of the District Court or of the Special Master.

On the contrary, both the Special Master and the District Court made express findings that the faults of *each* vessel contributed to causing the collision (R. 246; Finding IX, R. 293).

The Circuit Court of Appeals not only affirmed such findings but also said that "it is clear that each was guilty of one or more serious navigational faults contributing to the collision" (R. 1421).

Petitioner's first premise that the faults of the Feltre in themselves were sufficient to account for the collision thus collapses in the light of the unanimous findings of the Courts below.

Petitioner's contention is made with ill grace in view of the fact that its vessel was found guilty of the *initial* fault, violation of the narrow channel rule, which induced and made operative the subsequent faults of the Feltre (R. 1422). The victim, not the aggressor, ordinarily seeks the benefit of an exculpatory rule.

Yamashita Kisen Kaisha v. McCormick S.S. Co., 20 F. (2d) 25, 27 (9 C.C.A.).

Petitioner's second premise is that the findings of fault of its vessel were based on evidence which was not clear nor convincing. We find it difficult to believe that such contention is made seriously in the face of evidence which

was sufficiently clear and convincing to cause three tribunals below to find that petitioner's vessel was guilty of faults contributing to the collision.

The Special Master found the evidence clear and convincing in holding petitioner's vessel at fault. He said (R. 243):

> "From a perusal of the above, Your Special Master is compelled to reach the inevitable conclusion that both vessels are guilty of major faults and that, as indicated above, they are both chargeable with committing fatal statutory faults of navigation."

The findings of the District Court, confirming the report of the Special Master, express no doubt as to the sufficiency of the evidence (R. 289-297).

Petitioner professes to find such doubt in the opinion of the Circuit Court of Appeals (Petition, p. 10). In developing this theory, petitioner sets forth certain brief phrases carefully culled and conveniently removed from their context in the opinion (Petition, p. 6). Such petty squabbling over the phrases so painstakingly selected from the opinion without regard for the positive findings of the Court is indicative of the lack of merit to petitioner's contention.

The phrases repetitiously applied by petitioner to the evidence are: "in sharp conflict", "fairly clear", "persuasive" and "may be doubted". Findings based on conflicting evidence are not thereby doubtful. Conflicting evidence supports a finding beyond any reasonable doubt in a criminal action and the proof required in a civil action is certainly not more stringent.

"Fairly clear" evidence is not doubtful evidence. "Fairly" means "plainly", "distinctly", "completely" as

well as "moderately". The Circuit Court of Appeals did not in any event use the phrase in referring to the evidence in general, but in pointing out the fallacy of petitioner's contention that the Feltre sank at the very spot of collision (R. 1424).

"Persuasive" evidence certainly is convincing evidence. The Court applied "persuasive" to the fact that the record *as a whole* established that petitioner's vessel wrongfully crossed the proper course of the Feltre (R. 1426).

The Circuit Court of Appeals did not apply the phrase "may be doubted" to the evidence as a whole. The phrase was used in discussing whether petitioner's vessel crossed the Feltre's course during the former's "advance" while trying to swing, or while she was maintaining a steady course (R. 1426). The *manner* in which the Luckenbach crossed the Feltre's course is not the important fact. The important fact is that the Luckenbach *did cross* the Feltre's course and the Court so clearly found (R. 1426).

After setting forth the isolated phrases referred to above, petitioner makes the over-bold statement that there is no statement or finding in the majority opinion that the evidence against the Edward Luckenbach was clear and convincing or free from doubt (Petition, p. 6). Petitioner is mistaken. The Court said (R. 1421):

> "Whether each vessel was guilty of all of the faults attributed to it we need not inquire, since it is clear that each was guilty of one or more serious navigational faults contributing to the collision."

It is, then, perfectly clear from the opinion of the Circuit Court of Appeals that it did not hold petitioner's

vessel at fault on doubtful evidence. It is equally clear that the Court did not have or express any doubt as to the fault of petitioner's vessel in causing the collision.

Petitioner, continuing its disregard of the record, states that the opinion below "cited no authority to sustain its decision against the Edward Luckenbach (Petition, p. 6). The opinion below quotes Section 210 of Title 33 U. S. Code and states: "We agree that the narrow channel rule is applicable" (R. 1421). Petitioner was not unaware of the authority thus cited by the Court to sustain the decision against the Edward Luckenbach, for petitioner sets forth in its brief (page 15) the above quotation from the opinion.

E. QUESTIONS OF FACT, AGREED UPON BY THREE COURTS BELOW, PRESENT NO REASON FOR ALLOWANCE OF A WRIT OF CERTIORARI.

Petitioner's stated reason for allowance of a writ of certiorari herein is that the decision below conflicts with decisions of this Court and of Circuit Courts of Appeals (Petition, p. 12).

Since the only question presented by petitioner is the comparative weight of the evidence which supports the findings of fact, it is obvious that the determination of that question in this particular case cannot possibly conflict with the determination of the facts on wholly different evidence in other unrelated cases.

In *General Talking Pictures Corp. v. Western Electric Co.,* 304 U. S. 175, 178, 82 L. Ed. 1273, 1275, this Court said:

"Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."

SUMMARY OF ARGUMENT.

I. The concurrent findings of the three Courts below that petitioner's vessel violated the narrow channel rule is supported by conclusive evidence.

1. The testimony of petitioner's own witnesses establishes its fault.

2. Petitioner's own records establish its fault.

3. Competent, disinterested witnesses saw the Luckenbach proceeding up the wrong side of the channel.

4. The Feltre witnesses saw the Luckenbach cross the Feltre's range course.

II. The authorities cited by petitioner do not in any way conflict with the decision below.

1. Petitioner's vessel was found guilty of a major fault on clear evidence.

2. Petitioner was accorded a trial *de novo*.

III. The dissenting opinion is based on assumptions of fact which are not supported by the record.

ARGUMENT.

I.

THE CONCURRENT FINDINGS OF THE THREE COURTS BELOW THAT PETITIONER'S VESSEL VIOLATED THE NARROW CHANNEL RULE IS SUPPORTED BY CONCLUSIVE EVIDENCE.

Since the petition herein seeks merely to have this Court review the weight of the evidence, it presents no proper ground for review on writ of certiorari. We, therefore, deem it to be unnecessary to set forth a detailed discussion of the evidence. A short summary of the evidence against petitioner will show the "clear and convincing" character of the evidence supporting the finding that petitioner's vessel violated the narrow channel rule. Such summary will also reveal the one-sided nature of petitioner's reference to the evidence in its brief.

1. The testimony of petitioner's own witnesses establishes its fault.

(a) Captain McNelly, pilot of the Edward Luckenbach, testified that when the white light on the middle dike of Cottonwood Island was betwen the bow and bridge of his vessel, the light bore about a point on the port bow (R. 1311). This bearing, of course, placed the Luckenbach very close to the light on her extreme lefthand side of the channel.

He also testified that when he later ordered right rudder, which petitioner contends was about three minutes before the collision, the Luckenbach was 250 to 300 feet off the Upper Cottonwood Island Range, the Feltre's proper course (R. 1299). The Luckenbach was then proceeding on a course of 155.5°, which would converge with that of

the Feltre (R. 428, 1425). Since a vessel will advance two or three lengths (the Luckenbach is 457 feet long) along her old course before gaining ground on the new course, the Luckenbach necessarily advanced along her old course of 155.5° for well over 300 feet and thereby crossed the Feltre's range course, a violation of the narrow channel rule.

Ocean S.S. Co. v. U. S., 38 F. (2d) 782, 784 (2 C.C.A.);

Marshall Field & Co. v. U. S., 48 F. (2d) 763, 767 (2 C.C.A.).

(b) Captain Murphy, master of the Luckenbach, testified that his vessel "came over on this Upper Cottonwood Island Range" (R. 403). The range referred to was the Feltre's proper course and was well on the Luckenbach's lefthand side of the channel in the vicinity of the collision (R. 1423).

In view of the foregoing testimony of both the pilot and the master of the Luckenbach, it is difficult to comprehend the basis for petitioner's criticism of the finding by the Circuit Court of Appeals that the Luckenbach crossed the Feltre's proper course and thereby violated the narrow channel rule (Petitioner's Brief, pp. 32-33).

(c) Rupp, the helmsman of the Luckenbach, testified that when the one-blast signal was blown by the Feltre, the Luckenbach's pilot gave him the order "Hard right", which he executed (R. 533, 550, 554). Second Officer Hodson of the Luckenbach testified that "hard right" means "to turn the vessel as rapidly as possible" (R. 830). This testimony is an admission that the Luckenbach was at that time on the wrong side of the channel. It is perfectly

obvious that if the Luckenbach had been on her right side of the river she would have changed her course only a few degrees to the right merely to insure a wider margin of passing the Feltre who was admittedly on a proper course at that time (R. 1423).

(d) Petitioner's witnesses all agreed that the Feltre blew a two-blast signal and thereupon turned left when the two vessels were 500 to 690 feet apart and less than one-half minute before the collision (R. 410, 487, 586, 1288). It was not disputed, as stated in the opinion below, that the Feltre was proceeding on her proper range course at the time she blew the two-blast signal (R. 1423). The Feltre could not possibly leave such course on the range in traveling her portion of the 500 to 690 feet which separated the two vessels, but would "advance" along her range course two or three lengths before gaining any ground to the left. The testimony of the Luckenbach's officers as to the distance between the two vessels less than one-half minute before the collision thus conclusively establishes that the collision occurred on the Luckenbach's lefthand side of the channel.

2. Petitioner's own records establish its fault.

The Luckenbach was equipped with a course recorder which automatically recorded the courses steered (R. 229). The courses so recorded are shown on Petitioner's Exhibit No. 7, Murphy. The courses shown on this record corroborate the testimony of all the eyewitnesses who saw the Luckenbach proceeding on the wrong side of the river (R. 1427).

3. Competent, disinterested witnesses saw the Luckenbach proceeding up the wrong side of the channel.

Three witnesses who were on vessels following the Luckenbach upstream testified that she was proceeding on the lefthand side of the channel. These witnesses had no interest whatever in the litigation. They were familiar with the river, the channel and the navigational lights. Their disinterest entitles their testimony to particular weight (R. 1425). Their testimony alone is clear and convincing evidence that the Luckenbach violated the narrow channel rule.

Captain Henry F. Stayton, Columbia River pilot in charge of the steamer West Camargo, testified that when the Luckenbach passed between the red flashing buoy and the green light marking the channel at the upper end of Cottonwood Island, she was much nearer to the green light on her lefthand side of the channel than she was to the red light (R. 1127-1128).

Captain R. E. Carrau, pilot on the river tug Georgia Burton, and his watchman, Lloyd Deuchar, both testified that the Luckenbach was well on her left side of the channel when she passed between the red and green lights (R. 1078-1079, 1110).

It is admitted that after the Luckenbach had passed between the red and green lights she proceeded for four minutes on a course of 155.5°, as shown by her course recorder (R. 427, 1283). This course pursued from the left side of the channel off the green light for four minutes at a speed of 7.77 knots, the speed petitioner claims, necessarily carried the Luckenbach across the range course of the Feltre. Despite the clear statement of these facts in

the opinion below (R. 1425), petitioner has the temerity to state that such conclusion was based solely on the Conway chart (Brief, pp. 29-30). Perhaps petitioner in disjointing the opinion below for its particular purposes has overlooked the contents thereof as a whole.

4. The Feltre witnesses saw the Luckenbach cross the Feltre's range course.

The Feltre witnesses testified that the Luckenbach proceeded across their course from left to right, obscured the lights of the upper range and finally turned right into collision (Turppa, R. 1013-1015; Magris, R. 966-968; Cernolli, R. 934, 939; Roiaz, R. 948).

Their testimony definitely shows that the Luckenbach was on the wrong side of the channel as the two vessels approached collision. Such testimony in itself amply supports the findings made below. Their testimony is fully corroborated by the evidence referred to above. In addition the Feltre was proceeding down a range course definitely fixed by lights so her position in the channel was known (R. 1422-1423). The Luckenbach witnesses could not definitely fix her location in the channel at the time of the collision (R. 506, 788, 828, 1295). There is, therefore, valid reason for giving greater credence to the Feltre witnesses than to the Luckenbach witnesses.

The evidence of petitioner's own witnesses and its own records, the testimony of disinterested, maritime eye-witnesses, and the testimony of the Feltre's witnesses is certainly "clear and convincing" proof that the Luckenenbach violated the narrow channel rule. The Courts below could not reasonably have made any other finding.

II.

THE AUTHORITIES CITED BY PETITIONER DO NOT IN ANY WAY CONFLICT WITH THE DECISION BELOW.

1. Petitioner's vessel was found guilty of a major fault on clear evidence.

Petitioner refers to cases setting forth the so-called "major and minor fault rule" (Brief, p. 36). The rule simply means that where the gross fault of one vessel is established by uncontradicted evidence, and such fault is, of itself, sufficient to account for the collision, it is not sufficient for such vessel to raise merely a doubt with regard to the management of the other vessel.

The faults charged and proved against the Luckenbach were not acts of merely doubtful management. The Luckenbach was found guilty of violating the narrow channel rule, a statutory and major fault. A vessel which is found guilty of a statutory fault has the burden of proof to show not merely that her fault might not have been one of the causes, but that it could not have been a cause of the collision.

> *Lie v. San Francisco & P. S. Co.*, 243 U. S. 291, 298, 61 L. Ed. 726, 733.

Since it is clear both from the record and the opinions of the Courts below that there is especially strong evidence to support such finding of fault against the Luckenbach, the major and minor rule is satisfied in any event.

However, an examination of the cases cited by petitioner will show that the major and minor fault rule was in each instance applied against the vessel guilty of the *initial* fault. It is clear in this case that the Luckenbach was on

the wrong side of the channel for a considerable time prior to the collision (R. 1422). The faults which the Feltre subsequently committed were faults induced by and made operative by the Luckenbach's violation of the narrow channel rule. The Feltre's faults of themselves, therefore, are not sufficient to account for the collision. The Courts below did not find that the faults of the Feltre of themselves accounted for the collision, but expressly found that the faults of each vessel contributed to the collision (Finding 12, R. 246; Finding IX, R. 293; R. 1421).

Petitioner states throughout its petition and brief that nearly all of the faults of the Feltre were established by uncontradicted testimony (Petition, p. 3; Brief, p. 13). This statement is not accurate. Certain of the acts or maneuvers of the Feltre were frankly admitted by her witnesses, but there was a conflict between the two vessels as to the time, place and circumstances attendant upon such maneuvers. For example, the Feltre admittedly did not stop and reverse, but her lack of action in this respect was not a fault unless the Luckenbach was on the Feltre's side of the channel. The Luckenbach claims that she was on her side of the channel and the Feltre denies that claim. The fault of the Feltre was established by resolving such conflict. This case is not one, then, where the gross fault of one vessel, sufficient in itself to account for the collision, is established by uncontradicted evidence and there is doubt as to the fault of the other. On the contrary, the Courts below were satisfied by ample evidence that each vessel was guilty of faults which contributed to the collision (R. 1421). Under such circumstances both vessels are

properly held at fault even if the fault of one vessel be clearer than that of the other.

The Albert Dumois, 177 U. S. 240, 255, 44 L. Ed. 751, 760;

The Chattahoochee, 173 U. S. 540, 543, 43 L. Ed. 801, 803.

2. Petitioner was accorded a trial de novo.

Petitioner contends that the Circuit Court of Appeals failed to accord it a trial *de novo* (Brief, p. 38). This contention is apparently based upon the fact that the Court, having found petitioner's vessel guilty of violating the narrow channel rule, found it unnecessary to discuss all the other faults found against it by the Special Master and the District Court.

It is apparent from the opinion below that the Court did weigh and consider the evidence as a whole. The Court did not merely state that there was some evidence to support the trial Court's findings. The Court stated that the *weight* of the evidence required an affirmance (R. 1421). The opinion discusses the evidence in sufficient detail to show that both vessels were clearly at fault for the collision. An Appellate Court is certainly not required to set forth in its opinion a discussion of all the evidence contained in a record of over 1400 pages.

The finding by the Court below that petitioner's vessel violated the narrow channel rule was sufficient to establish petitioner's liability and to support the decree against it. Petitioner is just as liable for one contributory fault as for a dozen.

The San Simeon, 63 F. (2d) 798, 801 (2 C.C.A.).

Findings that petitioner was or was not guilty of the other faults charged to it could in no conceivable manner affect the finding that the Luckenbach violated the narrow channel rule. When a Court has determined issues which are sufficient to dispose of the case, it is unnecessary to consider other questions which could not affect the result.

Hobbs v. Head & Dawst Co., 231 U. S. 692, 700, 58 L. Ed. 440, 444;

Great Northern R. Co. v. Weeks, 297 U. S. 135, 152, 80 L. Ed. 532, 543;

M'Lanahan v. The Universal Insurance Co., 26 U. S. 170, 182, 7 L. Ed. 98, 104.

III.

THE DISSENTING OPINION IS BASED ON ASSUMPTIONS OF FACT WHICH ARE NOT SUPPORTED BY THE RECORD.

The dissenting judge expressly states that his disagreement with the majority of the Court is entirely on questions of fact and that he agrees with the majority on the law applicable to determining liability for the collision (R. 1427, 1433). The dissenting opinion thus confirms that no important question is here presented for review on writ of certiorari. A brief reference to the dissenting opinion will emphasize the correctness of the concurrent findings of the Special Master, the District Court and the Circuit Court of Appeals.

The dissenting opinion is based on two assumptions. First, the dissenting judge assumes that the collision occurred at practically the spot where the Feltre came to

rest in the river after the collision.[3] This conclusion is based on the fact that certain wreckage from both vessels was found near the sunken Feltre (R. 1434). The anchor flukes of the Luckenbach were found not merely after the collision but after the Feltre wreck had been raised and removed from the river (R. 861). However, the expert called by petitioner testified that the pieces of the Feltre's wreckage were found too close to her side to determine how far she may have moved to her left after the collision (R. 895). The witness recognized that the force of the collision would tend to set the Feltre to her left (R. 881).

It is inconceivable as a physical fact that the heavily loaded Feltre, moving at full speed, struck at a sharp angle, would sink at the moment of collision (*The San Simeon,* 63 F. (2d) 798, 799 (2 C.C.A.)). The vessels admittedly cleared each other before the Feltre sank after the collision, indicating that the Feltre thereafter moved at least her own length (R. 411). The men in the Feltre's engine room had time after the collision to escape to the main deck (R. 957-959). Pilot Turppa stated that the Feltre ran about 400-500 feet before grounding (R. 1018-1019). He also testified that the Luckenbach shoved the Feltre along to her left (R. 1048).

The Feltre grounded less than 4000 feet above the red buoy. The Luckenbach claims to have proceeded for seven

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[3]The position of the Feltre wreck in the river after the collision is shown on Petitioner's Exhibit 1, MacDuffee (not printed). The position of the Feltre shown on the chart attached to the majority opinion and to petitioner's brief herein is not accurate, being merely a freehand drawing of the Feltre depicting her as having a length of about 900 feet and a beam of about 300 feet, although she actually has a length of 460 feet and a beam of 55 feet (R. 1417).

minutes from the red buoy to the point of collision (R. 427-429, 1279). The Luckenbach admits a speed of 7.77 knots, so she must have run about 5500 feet from the red buoy to the point of collision or more than 1500 feet above the point where the Feltre grounded. The dissenting opinion fixes her speed at about 10 knots which would place the point of collision about 3000 feet above the point where the Feltre grounded. It is, therefore, apparent that the Feltre moved an appreciable distance to her left and downstream after the collision (she was moving under a left rudder and was struck on her starboard side). The collision under these circumstances certainly occurred on or near the Feltre's range course, for the Feltre grounded only about 150 feet to her left of midchannel (Petitioner's Exhibit No. 1, MacDuffee).

However, even the assumption of the dissenting judge that the collision occurred where the Feltre grounded does not justify his conclusion that such assumption shows that the Luckenbach had been proceeding up her side of the channel. The judge overlooks an important and inescapable fact. Petitioner states that the Luckenbach commenced to swing right three minutes before the collision and swung a total of 33° (Brief, p. 19). In proceeding for three minutes on a right swing at a speed of 8 to 10 knots, the Luckenbach necessarily gained a distance of 300 feet or more to her right. She, then, was on the Feltre's side of the river when the right swing commenced.

Most of the distance gained by the Luckenbach to the right would be gained in the last minute of the swing because of the vessel's advance. It is, therefore, obvious that the Luckenbach was still on the Feltre's side of the

channel in the last minute before the collision, as the Feltre grounded only about 150 feet beyond midchannel. Hence, even if the collision occurred where the Feltre grounded, that fact does not show that the Luckenbach had been proceeding up her side of the channel, but shows that she had reached that point only by moving from the wrong side of the channel in the last minute when the vessels were in the jaws of collision by reason of their previous negligent navigation.

This Court said in *The America*, 92 U. S. 432, 437, 23 L. Ed. 724, 726:

> "Inability to do anything effectual to prevent a collision, at the moment it occurs, usually exists; but it seldom happens that there is much difficulty in tracing the cause which produced it to some antecedent neglect, carelessness or unskillfulness in those having the command of one or both vessels."

Similarly in *The Modemi*, 58 F. (2d) 916, 917 (5 C.C.A.), the Court said:

> "Study of the record has convinced us, too, that the real fault in this case is not to be sought, or the real responsibility fixed, by a determination of what maneuver last preceded the collision. The fault lies farther back."

The dissenting judge, having made the assumption that the collision occurred where the Feltre grounded, was compelled to make a second assumption of fact in order to account for the Feltre being able to reach that point of collision from her course on the range. He, therefore, assumed that the Feltre had turned left off her range course sometime before she gave her two-blast signal (R.

1437-1439). This assumption is contrary to the testimony given by the navigators of both vessels. It is contrary to petitioner's pleading (Petition, paragraph XVII, R. 25). The testimony referred to by the dissenting judge does not support his assumption as it is apparent from Captain Turppa's quoted testimony that he is referring to the left turn just before the collision (R. 1438). In fact, as stated by the majority opinion, it was not disputed by petitioner that the Feltre continued on her range course until the two-blast signal was given (R. 1423). The Luckenbach witnesses, who testified that they continuously observed the Feltre, insisted that they did not see the green light of the Feltre or any change of her heading until the Feltre blew her two-blast signal (R. 408, 779, 782, 1293-1294). Any change of heading by the Feltre would be immediately apparent to them from her range lights.

Nevertheless, the dissenting judge assumes that the Feltre did turn left before her two-blast signal, apparently forgetting that, if this be so, the Luckenbach navigators were negligent in failing to observe and act upon such change. Petitioner made no such argument for it was well aware that if the Feltre turned left while far enough upstream from the Luckenbach to proceed 300 feet to the left of the range, the Luckenbach would immediately have been required to blow a danger signal, stop and reverse, which she did not do. The argument of the dissenting judge convicts the Luckenbach of that fault.

The Albert Dumois, 177 U. S. 240, 252, 44 L. Ed. 751, 759;

The San Simeon, 63 F. (2d) 798, 801 (2 C.C.A.).

CONCLUSION.

We respectfully submit that the petition for writ of certiorari should be denied, as petitioner merely seeks to review the weight of the evidence upon which concurrent findings of fact were made by the Special Master, the District Court and the Circuit Court of Appeals.

Dated, San Francisco, California,
July 17, 1942.

Respectfully submitted,
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JAMES A. QUINBY,
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Due service and receipt of a copy of the within is hereby admitted

this_____day of July, 1942.

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Counsel for Petitioner,
Luckenbach Steamship Company, Inc.

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